

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

POINT PARK UNIVERSITY,	*	
Respondent/Employer	*	
and	*	
	*	6-CA-34243; 6-RC-12276
NEWSPAPER GUILD OF PITTSBURGH/	*	
COMMUNICATIONS WORKERS OF	*	
AMERICA, LOCAL 38061,	*	
Charging Party/Petitioner	*	

MOTION TO PARTICIPATE AS *AMICI CURIAE*
IN SUPPORT OF POINT PARK UNIVERSITY

The American Council on Education (“ACE”), the National Association of Independent Colleges and Universities (“NAICU”), the Council of Independent Colleges (“CIC”) and the Association of Independent Colleges and Universities of Pennsylvania (“AICUP”), by their attorneys, submit this motion to participate as *amici curiae*, in support of the position taken by Respondent Point Park University on remand from the Decision and Order of the United States Court of Appeals for the District of Columbia Circuit.

The *amici* collectively represent the interests of virtually all institutions of higher education, particularly independent colleges and universities that are most directly affected by the National Labor Relations Act. ACE represents 1,800 accredited, degree-granting colleges and universities and higher education-related associations, organizations, and corporations. Founded in 1918, ACE serves as the nation’s unifying voice for higher education. ACE serves as a consensus leader on key higher education issues and seeks to influence public policy through advocacy, research, and program initiatives.

NAICU serves as the unified national voice of private, nonprofit higher education in the United States. Founded in 1976, NAICU currently has nearly 1,000 members nationwide, including

traditional liberal arts colleges, major research universities, special service educational institutions, and schools of law, medicine, engineering, business, and other professions. The association represents these institutions on policy issues primarily with the federal government, such as those affecting student aid, taxation, and government regulation.

Founded in 1956, CIC is the major national service organization for small and mid-sized, independent, liberal arts colleges and universities in the United States. CIC has nearly 600 members and affiliates including liberal arts, comprehensive, and international institutions, as well as higher education-related associations. CIC works to support college and university leadership, advance institutional excellence, and enhance private higher education's contributions to society.

AICUP is the only statewide organization that serves exclusively the interests of private higher education within the Commonwealth of Pennsylvania. AICUP provides its 83-member private colleges and universities with services and programs tailored specifically to the needs and situation of independent higher education.

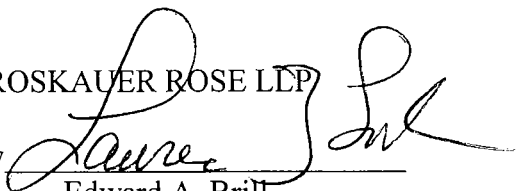
The *amici* are concerned that the Regional Director misapplied the standard outlined in *National Labor Relations Board v. Yeshiva University*, 444 U.S. 672 (1980), and progeny for identifying and excluding faculty serving in a managerial capacity from the scope of the National Labor Relations Act (“NLRA”). The *amici* accordingly submitted a brief and participated in oral argument in support of Point Park University on its appeal to the United States Court of Appeals for the District of Columbia. On remand, the *amici* would again like to offer their collective experience with institutions of higher education and the realities of academic governance by faculty and administrators. The *amici*’s perspective on the issues involved can assist the Board in responding to the Court of Appeals’ mandate to identify which of the *Yeshiva* factors are “significant and which less so, and why.”

Thus, the *amici* respectfully request that they be granted the opportunity to submit a statement of position to the Board in support of Point Park University in order to represent the interests of institutions of higher education with regard to this issue. The Regional Director and the Petitioner have declined to consent to the *amici curiae*'s requested appearance.

Dated: New York, New York
December 14, 2006

PROSKAUER ROSE LLP

By



Edward A. Brill

Lawrence Z. Lorber

Tracey I. Levy

Attorneys for *Amici Curiae*

American Council on Education, National Association of
Independent Colleges and Universities, Council for
Independent Colleges, and Association of Independent
Colleges and Universities of Pennsylvania

1585 Broadway
New York, New York 10036
(212) 969-3015
(212) 969-2900 (fax)

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NATIONAL LABOR
RELATIONS BOARD
ORDER SECTION

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

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POINT PARK UNIVERSITY,	:	
	:	
Respondent -	:	
Employer,	:	Case Nos. 6-CA-34243
-and-	:	6-RC-12276
	:	
NEWSPAPER GUILD OF PITTSBURGH /	:	
COMMUNICATIONS WORKERS OF	:	
AMERICA, LOCAL 38061,	:	
	:	
Charging Party -	:	
Petitioner.	:	
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AMICI CURIAE STATEMENT OF POSITION IN SUPPORT OF RESPONDENT

PROSKAUER ROSE LLP
Attorneys for *Amici Curiae*
1585 Broadway
New York, NY 10036
(212) 969-3015

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THE *AMICI CURIAE*

The American Council on Education (“ACE”), the National Association of Independent Colleges and Universities (“NAICU”), the Council of Independent Colleges (“CIC”) and the Association of Independent Colleges and Universities of Pennsylvania (“AICUP”) collectively represent virtually all institutions of higher education, particularly independent colleges and universities which are most directly affected by the National Labor Relations Act. The *amici* respectfully submit this statement of position, with the consent of all parties, in support of Respondent/Employer Point Park University.

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SUMMARY OF ARGUMENT

Twenty-seven years ago, in *NLRB v. Yeshiva Univ.*, 444 U.S. 672 (1980), the Supreme Court set forth a standard for identifying and excluding faculty serving in a managerial capacity from the scope of the National Labor Relations Act ("NLRA"). Subsequent Board decisions offered guidance to institutions of higher education and their faculties on the application of the Supreme Court's decision and the plethora of factors appropriate to an analysis of managerial status. These decisions reflect a hierarchy of academic factors relevant to managerial status: (i) faculty authority over the curriculum and course offerings is paramount among the factors relevant to managerial status; (ii) authority relating to course scheduling, grading, graduation, student admission and retention policies, matriculation standards, and teaching methods are important, but not determinative; and (iii) authority regarding such other factors as tuition or faculty hiring and tenure are of lesser significance.

Although this hierarchy can be gleaned from the Board's earlier decisions, the Board has never expressly enunciated the relative import of the *Yeshiva* factors. This case is returning to the Board upon remand from the Court of Appeals because the Court held that, in finding the Point Park faculty were employees, the Regional Director failed to "explain which factors he found significant and which less so, and why." Indeed, and particularly troubling to

the *amici*, the Regional Director appears to have largely ignored evidence of the role of Point Park faculty in the curriculum and other academic matters, while relying on a handful of isolated exceptions to bolster his finding of employee status. The Regional Director's entire analysis appears to have been inappropriately colored by the faculty's limited role in Point Park's structural transition from college to university status – a quintessentially administrative responsibility that typically affects the long-range plan and outlook of the institution, but not the curriculum, course offerings and other matters within the sphere of faculty authority.

Consistent with the Court's directive, and to provide guidance to institutions of higher education and their faculties, the *amici* urge the Board to expressly pronounce the relative import of the factors identified in *Yeshiva* as relevant to the issue of managerial status. Based on their understanding of the facts as presented by Point Park University, the *amici* believe that, when properly applied, these factors mandate that the faculty at Point Park are managers and thereby excluded from the National Labor Relations Act.

ARGUMENT

POINT I

THE BOARD SHOULD CLEARLY ENUNCIATE THE RELATIVE IMPORT OF THE FACTORS THAT SHOULD BE CONSIDERED IN DETERMINING MANAGERIAL STATUS UNDER *YESHIVA*.

In *NLRB v. Yeshiva Univ.*, 444 U.S. 672 (1980), the Supreme Court identified a host of factors that are relevant to the analysis of managerial status. The Regional Director cited a number of these factors in his lengthy analysis but, as the Court of Appeals held, the Regional Director failed to explain which factors he “found significant, which less so, and why.” *Point Park Univ. v. NLRB*, 457 F.3d 42, 46 (D.C. Cir. 2006). In addition to this failure to prioritize, the Regional Director appeared to focus on isolated exceptions to the evidence of faculty's

managerial authority, and on the administration's or the board of trustees' *potential* authority to overrule faculty decisions, rather than the actual evidence that such authority is rarely if ever exercised. Such an approach is contrary to the holding and analysis in *Yeshiva* and inconsistent with many of the Board's earlier post-*Yeshiva* decisions.

In *LeMoyne-Owen College*, 345 N.L.R.B. No. 93 (Sept. 30, 2005), upon remand from the Court of Appeals for similar deficiencies in the Regional Director's analysis, the Board began to clarify the proper focus of inquiry with respect to the managerial status of faculty. The Board rejected the Regional Director's reliance on the fact "that the faculty do not possess absolute control over any facet of the school's operations," and reiterated the appropriate standard of effective recommendation. Applying that standard, the Board identified a variety of the *Yeshiva* factors (beginning with curriculum) that supported a finding of managerial control. The Board did not, however, make any explicit pronouncements as to the relative importance of the *Yeshiva* factors. The Board simply observed that a "mechanical application of *Yeshiva*, i.e., counting and comparing the number of areas in which faculty have input with the number of such areas in *Yeshiva*" is inappropriate because it "fails to measure the 'extent of [the] . . . influence . . . that render[s] each academic body unique.'" *Id.* at *26

The *amici curiae* agree with the Board that all the *Yeshiva* factors should not be given equal weight, nor must all be present in each case as a predicate to a finding of managerial control. At the same time, however, adjudication of these cases need not be entirely *ad hoc* and we respectfully urge the Board to clarify, for its Regional Directors, the parties in the instant matter, and institutions of higher education and their faculty more generally, some of the basic parameters as to which of the *Yeshiva* factors are of paramount importance, which less so, and how to balance those various considerations. To the extent *LeMoyne-Owen* and the Board's

earlier precedents provide insight into the appropriate balance, it is apparent that the Regional Director's decision as to Point Park misapplied the *Yeshiva* test and must be reversed.

A. *Yeshiva* Requires a Holistic View of University Governance, Focused on Faculty Authority with Respect to Academic Matters.

Sensitive to the uniqueness of academia, the Supreme Court recognized in *Yeshiva* that in the university context, managerial authority is more shared and less of a hierarchical pyramid than in the more typical industrial model. *Yeshiva*, 444 U.S. at 680. This distinction precludes a rote application of the Board's managerial standards as developed in the industrial context, but it does not permit the Board or its Regional Directors to impose stricter standards and require an absolute delegation of authority as a condition to finding that faculty act in a managerial capacity. See *LeMoyne-Owen College*, 345 N.L.R.B. No. 93 (Sept. 30, 2005) (holding that "[a]bsolute' control need not be demonstrated for a finding that faculty are managers), citing *Lewis & Clark College*, 300 N.L.R.B. 155, 163 n. 41 (1990).

At *Yeshiva*, it was the central administration (comprised of the President, four Vice Presidents and an Executive Council of deans and administrators), and not the faculty, that set general guidelines dealing with teaching loads, salary scales, tenure, sabbaticals, retirement and fringe benefits, and developed the budget, subject to the approval of the Board of Trustees. *Id.* at 675-76. The faculty also did not have direct access to the President or even the Vice Presidents. Rather, the five undergraduate and eight graduate schools at the university were largely autonomous entities, headed by a Dean or Director, and it was principally within these decentralized structures that the faculty exercised their managerial authority – meeting formally or informally (depending on the school) to discuss and decide such academic matters as curriculum, the grading system, admission and matriculation standards, academic calendars and

course schedules. *Id.* at 676. The faculty at each school also made recommendations to the Dean or Director with regard to faculty hiring, tenure, sabbaticals, termination and promotion and, in most cases, the faculties' recommendations were implemented. *Id.*

The faculty at Yeshiva thus played a central, but by no means exclusive, role in managing the educational institution. The faculty's authority was more circumscribed when the university faced fiscal concerns in the early 1970's, and the faculty's recommendations on personnel decisions were subject to budgetary constraints imposed by the administration. *Id.* While the union cited these limitations as evidence that the faculty were employees and lacked managerial authority, the Supreme Court unhesitatingly rejected this argument. The Court explained:

the fact that the administration holds a rarely exercised veto power does not diminish the faculty's effective power in policymaking and implementation. See nn. 4, 5, *supra*. The statutory definition of "supervisor" expressly contemplates that those employees who "effectively . . . recommend" the enumerated actions are to be excluded as supervisory. 29 U.S.C. § 152 (11). Consistent with the concern for divided loyalty, the relevant consideration is effective recommendation or control rather than final authority. That rationale applies with equal force to the managerial exclusion.

Id. at 684 n.17.

The Court went on to highlight certain indicia that were central to its finding of managerial control. The Court observed that the faculty's effective recommendation of policies in academic matters was of primary concern, and these included: curriculum and course schedules ("what courses will be offered, when they will be scheduled, and to whom they will be taught"), "teaching methods, grading policies, and matriculation standards," "which students will be admitted, retained, and graduated," "the size of the student body, the tuition to be charged, and the location of a school." *Id.* at 686. The Court also noted that at Yeshiva, the faculty

played a predominant role in hiring, tenure, sabbaticals, termination and promotion, but it did not rely on those “non-academic” factors as a basis for its decision.¹ *Id.* at 686 n.5.

Thus *Yeshiva* counsels that managerial authority is not to be reviewed in absolutist terms. Rather, there are many facets of university governance to be considered, particularly academic concerns, and the emphasis should be on “effective recommendation.” It is irrelevant whether the faculty’s decisions are potentially subject to veto by administrators or the trustees or whether in exceptional circumstances the faculty’s input was rejected or ignored.

B. Prior Board Decisions Highlight the Relative Importance of the *Yeshiva* Factors, and Cannot Be Reconciled with the Regional Director’s Decision Here.

Following *Yeshiva*, the Board has repeatedly reviewed claims of employee status at colleges and universities throughout the country. Those decisions highlight that certain factors are most determinative on the issue of managerial status. Thus, the Board has never found that faculty were managers where they did not effectively recommend policies with respect to the curriculum and course offerings. *See, e.g., LeMoyne-Owen Coll.*, 345 N.L.R.B. No. 93 (Sept. 30, 2005); *Lewis & Clark Coll.*, 300 N.L.R.B. 155, 161-63 (1990); *Elmira Coll.*, 309 N.L.R.B. 842, 844 (1992); *Univ. of Dubuque*, 289 N.L.R.B. 349, 350, 352 (1988); *Livingstone Coll.*, 286 N.L.R.B. 1308, 1310-11, 1313 (1987); *Am. Int’l Coll.*, 282 N.L.R.B. 189, 190, 201 (1986); *Univ. of New Haven*, 267 N.L.R.B. 939, 941 (1983). Further highlighting the import of these criteria, in all but two of the cases in which the Board held the faculty lacked managerial authority, it also found that the faculty’s authority with respect to the curriculum and course offerings was severely circumscribed. *Compare Univ. of Great Falls*, 325 N.L.R.B. 83, 95-96 (1997) (finding

¹ The Supreme Court and subsequent Board decisions have used the term “non-academic” to refer to personnel-type decisions such as faculty hiring, tenure, sabbaticals, termination and promotion; the *amici curiae* accept that terminology, while noting that many of these decisions also have important academic significance.

no managerial authority despite faculty's effective recommendation of curriculum over a two-year period; further details as to nature and number of recommendations were lacking); *Loretto Heights Coll. v. NLRB*, 264 N.L.R.B. 1107 (1982), *enforced*, 742 F.2d 1245, 1251 (10th Cir. 1984) (finding no managerial authority where faculty control of curriculum and course offerings is limited to their own disciplines or program areas).

The Board's findings with respect to this factor are consistent with the *amici's* own experience and understanding of university governance. Nearly forty years ago, ACE, the American Association of University Professors and the Association of Governing Boards of Universities and Colleges prepared a joint statement, reflecting the principles of shared responsibility and cooperative action in the context of academic governance. Statement on Government of Colleges & Universities, (1966) ("Joint Statement"). Among the principles outlined in the Joint Statement is the agreement that the "faculty has primary responsibility for such fundamental areas as curriculum, subject matter and methods of instruction." Joint Statement, Art. V. Curriculum development and course selection, within the framework of the institution as a whole, are the types of core academic decisions to which the skills, training and expertise of the faculty are uniquely suited, and institutions of higher education will typically vest their faculty with virtually complete authority in these areas.

Under the Board's decisions, and in practice, other academic factors, such as course scheduling, grading, graduation policies, student admission and retention policies, matriculation standards and teaching methods, are important, but not determinative, indicia of managerial status.² In each of the cases in which the Board found managerial status, the faculty was found to effectively recommend policies with respect to at least four of these seven factors.

² The Board noted in *Univ. of Dubuque*, for example, that the lack of controlling authority with respect to grading policies does not, in itself, preclude a finding of managerial status. 289 N.L.R.B. at 353.

See, e.g., *LeMoyne-Owen*, 345 N.L.R.B. No. 93 (faculty determine or effectively recommend grading, graduation standards, academic retention policies, teaching methods and selection of textbooks, and academic honors); *Lewis & Clark*, 300 N.L.R.B. at 161 (faculty made effective recommendations with regard to student admission and retention policies, matriculation standards, graduation policies, grading and teaching methods); *Dubuque*, 289 N.L.R.B. at 350, 352-53 (faculty made effective recommendations with respect to course schedules, teaching methods, graduation policies, grading and student admission and retention policies); *Am. Int'l*, 282 N.L.R.B. at 195-96, 201 (faculty made effective recommendations with respect to course schedules, matriculation standards, graduation policies, grading and student admission policies but not individual student admissions).

Variation among institutions with respect to faculty authority in these areas is, again, consistent with our experience. The uniqueness of each academic institution, historical differences in approach to governance, and market considerations will necessarily affect whether, and to what extent, these seven factors are within faculty control. See Joint Statement, Art. V (“[b]udget, manpower limitations, the time element, and the policies of other groups, bodies and agencies having jurisdiction over the institution may set limits to realizations of faculty advice.”) For example, faculty will most frequently be involved in setting student admission and retention policies in highly selective schools, while there will be little need for faculty input at schools that have open enrollment. Course scheduling also will generally fall within faculty control, but administrative concerns with optimizing classroom space or complying with accrediting standards may affect scheduling.

The three remaining academic factors cited by the Supreme Court in *Yeshiva* – size of student body, tuition and location of school – were of lesser import in that case, and are

mentioned infrequently as factors in subsequent decisions. *See id.*, 444 U.S. at 686. Although designated by the Supreme Court as “academic,” these factors are largely determined by economic considerations, which traditionally are the concern of the president and the trustees, rather than the faculty.

Finally, post-*Yeshiva* decisions have, at times, noted such academic considerations as setting the academic calendar, *see, e.g., Boston Univ.*, 281 N.L.R.B. 798 (1986), *aff’d, review denied, Boston Univ. Chapter, Am. Ass’n of Univ. Professors v. NLRB*, 835 F.2d 399, 401 (1st Cir. 1987), the acceptance of transfer credits, *Elmira*, 309 N.L.R.B. at 844, student absence policies, *Livingstone*, 286 N.L.R.B. at 1311, course enrollment levels, *Lewis & Clark*, 300 N.L.R.B. at 161, and student advising, *Am. Int’l*, 282 N.L.R.B. at 191, as indicative of managerial authority. The absence of any of these factors in *Yeshiva* precludes granting them controlling weight and they have not, in fact, been determinative in the Board decisions considering managerial authority.

Variability with respect to these factors is again consistent with the varying philosophies, traditions and economic considerations among institutions of higher education. At some institutions for example, faculty will have primary responsibility for student advising, while other institutions view this task as an administrative function and have independent counseling centers or designated advisors to assist with this responsibility. Faculty will frequently have input into course enrollment levels and some discretion as to whether to admit students into their class, but concerns with classroom assignments, average class size, accrediting standards and the like may necessitate administrative caps on enrollment levels. Similarly, acceptance of transfer credits has economic implications because students receive the benefit of a degree without having paid the degree-granting institution for a full academic program. It is thus

) appropriate for the Board to consider these factors in assessing managerial authority, but not to predicate its determination on their existence or absence.

) While of lesser import, Board decisions following *Yeshiva* have recognized that faculty control with respect to certain non-academic decisions is also relevant to managerial status. Foremost among these are decisions pertaining to faculty hiring, tenure, and promotions. In virtually every case in which faculty were found to have managerial status, they also were found to make effective recommendations with respect to these factors.³ See, e.g., *Lewis & Clark*, 300 N.L.R.B. at 158 n.30; *Univ. of Dubuque*, 289 N.L.R.B. at 351-52; *Am. Int'l*, 282 N.L.R.B. at 199, 201.

) Similarly, in the Joint Statement, Art. V, faculty are recognized as having primary responsibility with respect to matters of “faculty status,” including “appointments, reappointments, decisions not to reappoint, promotions, the granting of tenure, and dismissal.” These decisions require consideration of scholarship, service and citizenship that faculty are uniquely qualified to assess.

) The Board’s decisions and the practice within the academic community point to three distinct levels of inquiry: First, faculty authority in matters of curriculum and course selection is, for all practical purposes, a *sine qua non* of managerial status. Second, graduation policies, course scheduling, grading, student admission and retention policies, matriculation standards and teaching methods are also important and relevant considerations, and faculty should ordinarily have authority in a majority of these areas to be considered management. Third, other considerations, ranging from the academic calendar and course enrollment levels to

) ³ Other non-academic factors, such as selecting administrators, terminations and sabbaticals and leaves, were cited less frequently as indicia of managerial control. See, e.g., *Lewis & Clark*, 300 N.L.R.B. at 158, n.30 (faculty had managerial authority with respect to terminations and sabbaticals and leaves).

faculty status matters, remain relevant considerations but were not central to the Supreme Court's holding in *Yeshiva* and should not be determinative.

In this case, the Regional Director did not make any distinctions among the *Yeshiva* factors and certainly did not heed the Court's directive in *LeMoyne-Owen* (which the Court repeated in this case) to explain which were more important, which less so, and why. Had the Regional Director conducted such an analysis, he would have reached a different outcome. The record as found by the Regional Director strongly evidences faculty control with respect to curriculum and course offerings. *See* Point I(C), *infra*. In addition, the Regional Director's findings and the record evidence establish further that faculty made effective recommendations with respect to at least five of the seven supporting academic factors: faculty generally set grading policy, *see id.*; faculty set course schedules, subject only to a minimum weekly requirement (RD at 48); and, although not addressed by the Regional Director, the record (as cited by Point Park in its brief) reflects that faculty determine teaching methods, admissions standards for new programs, retention standards and graduation policies. Further, the Regional Director's findings reflect managerial control with respect to course enrollment levels (RD at 23) and issues of faculty status.⁴ Thus under the Board's prior decisions and any common measure of university governance, the faculty at Point Park are managers.

C. The Regional Director's Decision Requires Faculty Autonomy in Decision-Making that Far Exceeds *Yeshiva*'s Standards.

In this case, the Regional Director's misguided approach is most readily evident with respect to two of the key indicia of managerial authority – control of the curriculum and

⁴ All 14 full-time tenure recommendations were accepted by the President, 21 out of 25 recommendations for promotion were adopted, and 13 out of 13 recommendations for sabbaticals were approved. (RD 51-53, 27).

course offerings and grading policy. As discussed below, under controlling Board precedents each of these factors should have strongly counseled *in favor of* a finding of managerial status at Point Park. Moreover, examples of circumscribed authority cited by the Regional Director are inconsequential under *Yeshiva* and progeny.

The Regional Director based his findings with respect to curriculum on changes in the structure of a few departments and programs, even though the course offerings remained virtually unchanged. He ignored the abundant evidence of faculty control of curricular revisions by focusing on who had initially proposed those revisions. As the Supreme Court has explained, the fact that the faculty's authority in certain areas may be circumscribed by fiscal or other long-range policy concerns "does not diminish the faculty's effective power in policymaking and implementation." *Yeshiva*, 444 U.S. at 684 n.17, n.27 (holding a university administration may legitimately consider, and even reject, faculty proposals in the context of concerns with scarce resources and university-wide balance); *Lewis & Clark*, 300 N.L.R.B. at 161-62, 163 n. 33 (holding that managerial status is not defeated by the lack of faculty input into broad, institutional decisions such as the creation or elimination of departments or programs, or by consideration of the financial implications of academic decisions); *Elmira*, 309 N.L.R.B. at 845, 850 (concluding the president's creation of a new core curriculum for all students without approval of the faculty or the rejection of a faculty recommendation to eliminate a general degree requirement did not alter the status of the faculty).

Thus decisions regarding the ESL program, the Government and International Studies ("GIS") Department and the MBA programs, and the commissioning of market studies for three proposed programs, all were improperly cited as evidence that the faculty lacked managerial authority. (RD at 66, 73-75). The disbanding of the GIS Department was a

structural change – no courses were affected or eliminated (RD at 18), and the MBA programs were merged to address a mandate from the Pennsylvania Department of Education (not the administration).⁵ (RD at 25). These changes, and the market studies, reflect the types of long-term financial and structural considerations that fall outside the analysis of faculty status.

Further, the fact that some proposals considered by the faculty's Curriculum Committee were initiated by the administration, rather than the faculty (RD at 25), is not determinative of managerial status. *See LeMoyne-Owen*, 345 N.L.R.B. No. 93 at 32 n.18; *Lewis & Clark*, 300 N.L.R.B. at 158, 161; *Dubuque*, 289 N.L.R.B. at 352; *see also Yeshiva*, 444 U.S. at 682 (managerial employees are those who “formulate and effectuate management policies by *expressing and making operative the decisions of their employer*”) (emphasis added). The Regional Director's citation to the National Collegiate Honors Council's recommendations that were not shared with the faculty is also misplaced because there is no finding that the administration took any action in response to the recommendations. (RD at 19).

Most significantly, the programmatic changes cited by the Regional Director were isolated examples in a record of almost uniform adoption of the faculty's curricular recommendations. Nine of ten undergraduate programs proposed since 1998 and six of six graduate programs proposed since 2000 were reviewed by the Curriculum Committee and submitted to the Faculty Assembly for approval, and the Vice President of Academic Affairs (“VPAA”) *never* recommended that the President disapprove a program approved by the Faculty Assembly. (RD at 13). The administration also generally accepted new course offerings when recommended by the Faculty Assembly. (RD at 20). In addition, while 43 programs were

⁵ Irrespective of which, if any, ESL courses were retained by Point Park, the *amici* view an ESL program as a service to international students; it does not satisfy any academic requirement and is typically more akin to a counseling or tutoring program.

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recommended for discontinuance by the VPAA because of historic under-enrollment, only 13

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were approved by the Faculty Assembly and the other 30 remain active courses. (RD at 21).

Thus the administration acceded to the Faculty Assembly's recommendations as to *all* 43 of the

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proposed programs. While the Point Park faculty's authority with respect to curriculum, course

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offerings and program discontinuance was not absolute, the administration's nearly universal

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acquiescence to the faculty's recommendations in these areas should have been deemed

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sufficient to evidence managerial control.

Similarly, the faculty's control of grading policy is not defeated merely because

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on three occasions (out of the thousands of grades that were awarded to students each year) the

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VPAA directed that a grade be changed. *Cf.* RD at 49. Grades were changed on one other

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occasion (for 18 students in a business class) and this was at the recommendation of the faculty

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review committee. *Id.* On the broader issue of the appropriate grading system to be employed at

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Point Park, the faculty effectively rejected adoption of a university-wide plus/minus grading

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system and instead voted to permit each school to determine for itself whether to adopt such a

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system. (RD at 10 n.25). One school subsequently adopted a plus/minus grading system with

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the endorsement of that school's faculty. *Id.* Thus, the Regional Director's decision reflects that

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the faculty had managerial control with respect to grading policy.

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The remaining examples of purportedly circumscribed authority cited by the

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Regional Director do not justify a finding of employee status. The cap on course enrollment

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levels set by the administration did not unduly circumscribe faculty authority since faculty

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retained discretion to determine whether and to what extent to fill a "reserve of five extra spaces"

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per course. (RD at 24). *See Elmira*, 309 N.L.R.B. at 843 (finding managerial status despite class

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size limits set by the administration). A requirement that course syllabi be prepared so they

would meet standards set by the Pennsylvania Department of Education (RD at 33-34); a decision to offer some of the university's courses on-line (a change in method of course delivery, not format, and for which no students enrolled) (RD at 22); the suspension of faculty-led trips abroad because faculty planned and booked trips without proper authorization (such as one that coincided with the war in Iraq and for which the faculty member had not secured proper cancellation insurance) (RD at 23); and changes in teaching loads for faculty (which pertains to working conditions, not academic matters) (RD at 32-34) do not even qualify as indicia of managerial control under prior cases.

Finally, the Board made clear in *Dubuque* that a finding of managerial status is not limited to "only institutions with faculties having as much or nearly as much input as the Yeshiva faculty. In fact, the implication is quite the opposite." 289 N.L.R.B. at 353. Thus, the absence of a precise match between all the factors evidencing managerial control in a particular Board decision and those present at Point Park is not required to support a finding of managerial status.

POINT II

THE BOARD SHOULD CLARIFY THAT STRUCTURAL CHANGES WITHOUT FACULTY INPUT DO NOT AFFECT MANAGERIAL STATUS.

This case presents the additional issue of whether the lack of significant faculty involvement in overall structural changes to an institution of higher education (here primarily stemming from the decision to seek university status) defeats other indicia of managerial status under *Yeshiva*. Structural change is inevitable as schools seek to maintain their competitive edge and enhance their standing in the academic community. Many structural innovations, however, have little effect on the core of teaching and learning at a college or university.

The transition from college to university status in particular may simply represent a change in name, with limited import to the academic facets of the institution. Such a change in designation can be made without ever establishing a graduate school or offering different or additional degree programs. See, e.g., Kit Lively, *Why Colleges Want to Be Called Universities*,” CHRONICLE OF HIGHER EDUC. (June 13, 1997). Under the Carnegie Foundation’s Classification System, which is the most widely recognized system for classifying institutions of higher education, there is no clear distinction between institutions denominated as “colleges” and those entitled “universities.”

It is well-recognized in the academic community that structural changes are typically within the unique province of the trustees and the administration, although institutions are encouraged to consult and collaborate with the faculty and other institutional stakeholders in implementing such changes. See AGB Statement of Institutional Governance, at 4 (Nov. 8, 1998). While the trustees and administration concern themselves with university structure and long-range planning, it is the faculty that “has primary responsibility for such fundamental areas as curriculum, subject matter and methods of instruction, research, faculty status, and those aspects of student life which relate to the educational process.” Joint Statement, Art. V. This is the model of shared governance that has long distinguished colleges and universities from the typical industrial model of a hierarchical management pyramid. See *Yeshiva*, 444 U.S. at 680.

Recognizing this unique governing structure, in *Lewis & Clark* the Board explained that policy considerations pertaining to an academic institution’s financial viability and long-range planning “are much broader than those that the faculty members consider in their academic decision-making. The faculty’s lack of control over these particular decisions does not nullify the faculty’s extensive authority over academic matters.” 300 N.L.R.B. at 161-62. In

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Lewis & Clark the Board therefore reversed the Regional Director's finding that the creation of
) "umbrella committees" outside the formal committee structure and with only minority faculty
representation had negated the faculty's managerial authority under the *Yeshiva* factors. *Id.* at
161. Even though proposals initiated by the umbrella committees in some cases resulted in
) creating new programs over the objection of the faculty, the Board held that the faculty's
managerial status was unaffected. *Id.* at 158-59, 161. The Board went on to explain:

) An organization can have several levels of policy-making and,
hence, several levels of managerial employees. There is, therefore,
nothing inconsistent with the faculty members' having authority
) over one level of policy (*e.g.*, academics), and the administration
(including the board of trustees), having control over another (*e.g.*,
) financial viability and long-term planning). The board of trustees
and others in the administration are entrusted with the ultimate
policy-making and fiduciary responsibility for the College, not the
) faculty. . . . Thus, there are college policy questions (*i.e.*,
"financial resources," "general institutional goals," or "University-
) wide balance") that are broader than academic policy matters and
from which the faculty members may be excluded yet they remain
) managerial employees. . . .

Id. at 162 nn. 33 & 36.

) The Regional Director overlooked or misapplied the critical distinction in levels
of managerial authority articulated by the Board in *Lewis & Clark*. Thus, while the Regional
Director found that the faculty's involvement in the transition from college to university status
) was relatively limited, his decision tellingly does not reflect that the curriculum was altered or
that the faculty committee structure was affected by the transition. (RD 3-4, 31-32). Absent
) such a finding, the fact that the university structure was altered should be irrelevant to the
ultimate issue of managerial status.

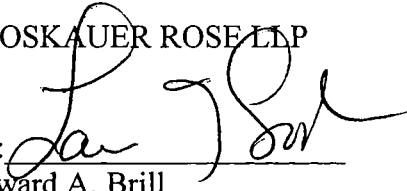
CONCLUSION

The *amici* organizations, broadly representative of the nation's private colleges and universities, are deeply concerned by the Regional Director's decision to the extent that it threatens the continuing vitality of the Supreme Court's *Yeshiva* decision. As directed by the Court of Appeals, we request that the Board clearly identify the relative import of the factors relevant to managerial control that were considered in *Yeshiva* and subsequent cases. Moreover, the Board should clarify that a lack of faculty involvement in structural changes does not, in itself, deprive a faculty of managerial control with respect to academic matters. Applying those parameters to the instant case, and based on our understanding of the factual record, the *amici* further urge the Board to reverse the determination of the Regional Director and find the faculty of Point Park to be managers.

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Respectfully submitted,

PROSKAUER ROSE LLP

By: 
Edward A. Brill
Lawrence Z. Lorber
Attorneys for *Amici Curiae*

Of Counsel:
Tracey I. Levy

1585 Broadway
New York, New York 10036
(212) 969-3015